

COUNTY OF KAUAI

Minutes of Meeting  
OPEN SESSION

Approved as circulated 2/16/18

Board/Commission:		BOARD OF ETHICS		Meeting Date		November 17, 2017	
Location		Mo'ikeha Building, Liquor Conference Room 3		Start of Meeting: 1:00 p.m.		End of Meeting: 1:55 p.m.	
Present		Vice Chair Michael Curtis: Members: Susan Burriss; Mia Shiraishi; Ryan de la Pena; Calvin Murashige Staff: Deputy County Attorney Nicholas Courson; Boards & Commissions Office Staff: Administrative Specialist Lani Agoot; Administrator Paula M. Morikami					
Excused		Chair Mary Tudela, Maureen Tabura					
Absent							
SUBJECT		DISCUSSION				ACTION	
Call To Order						Vice Chair Curtis called the meeting to order at 1:00 p.m. with 5 members present.	
BUSINESS		<u>BOE 2017-17 County Attorney Mauna Kea Trask respectfully requests an Open Session with the Board of Ethics to discuss the Board's authority, duties, and responsibilities</u>  County Attorney Mauna Kea Trask stated, for the record, the County Attorney's Office's (CAO) position on advisory opinions as far as content and how they should be utilized. He said the CAO's goal was to have a body of precedent that County officers and employees could look at based on well-reasoned and articulated decisions from the past that would inform future actions. The CAO wanted to see people be proactive and act ethically with guidance from the Board of Ethics. Mr. Trask clarified that his office gave legal advice; however, in the Charter it was clear that only the Board of Ethics had the authority to render advisory opinions and only those opinions could provide the appropriate cover for an officer or employee who acted within the scope of that opinion. He said that was why his office always qualified the advice they gave with a referral to the Board of Ethics.  Mr. Trask referenced case law that defined advisory opinions and their					

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	<p>process, and provided the following definitions: A declaratory order; <i>"Any interested person may petition an agency for declaratory order as to the applicability of any statutory provision or any rule or order of the agency"</i>. An advisory opinion under 20.05 d.2; <i>"It shall be the function of the Board of Ethics to render advisory opinions or interpretations with respect to application of the code upon request."</i> He said although there was nothing specific in 91-8, the Charter, or the Board of Ethics' rules regarding what an advisory opinion shall contain, the Board's advisory opinions are subject to a narrow appellate review by the circuit court if appealed. Mr. Trask advised the Board that their advisory opinions need to be clearly articulated and appropriate under the law. If they failed to do that, there would be nothing in the record to show that their advisory opinion was not arbitrary and capricious, and could be overturned by the circuit court. He said the CAO's concern with inadequate advisory opinions was that it would lower County officers' and employees' faith in the Code of Ethics if they thought the Board was arbitrary and capricious, and not seek the Board's review. Mr. Trask assured the Board that his office wanted to work with them to ensure that their advisory opinions were robust and clients were confident in seeking advisory opinions, knowing they would receive fair, well-reasoned opinions. And, if an advisory opinion was appealed, it would stand up in court.</p> <p>Mr. Murashige said that some requests were so baseless that he personally found there was no violation of the Code. Where the Board would need to go into detail would be when there was a conflict.</p> <p>Mr. Trask explained that not every opinion had to be the same in length, but every opinion should be as long and as well-reasoned, as necessary. He said his concern was with the more complex questions, and that he didn't think the Board was getting the tough questions because people didn't feel the</p>	

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	<p>simple questions were being dealt with appropriately.</p> <p>Vice Chair Curtis stated that the meeting minutes of October 20, 2017 were not approved and asked for a motion.</p>	
<b>Approval of Minutes</b>	<u>Regular Open Session Minutes of October 20, 2017</u>	Mr. de la Pena moved to approve the Open Session minutes of October 20, 2017. Mr. Murashige seconded the motion. Motion carried 5:0.
<b>Business Cont.</b>	<p>Vice Chair Curtis stated that at the Board's last meeting, Dee Crowell requested an advisory opinion regarding whether an 89-day contract position was considered an "employee" of the County, and asked Mr. Trask if that was the type of opinion people were afraid to bring before the Board of Ethics. Mr. Trask replied yes. He said what concerned him was when he was at Council recently and heard the comment "let's just get rid of the Board of Ethics," as well as other non-specific comments. Whether or not those comments were just complaining and unsubstantiated, he wanted to work together with the Board so that those comments wouldn't be substantiated in the future.</p> <p>Ms. Burriss stated that she was confused and wanted to know specifically what the CAO wanted. Mr. Trask clarified that he wanted the Board's advisory opinions to contain a findings of fact, conclusions of law, and a decision and order; and that his office wanted to help the Board with a draft template. He said the Board could go into executive session and discuss the facts as they saw them, determine their reasoning, and work with their County Attorney to get the conclusions to support their reasoning. Mr. Trask said he wanted to build this body of law (the Board of Ethics) because the community was best served with an ethical government, and an ethical government was best created with well-reasoned, proactive guidance from</p>	

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	<p>the Board of Ethics.</p> <p>Ms. Burriss said she thought the subject that generated the discussion was from their last meeting on whether an 89-day contract was a contract of employment, and that there was some objection at the meeting that the Board was being asked to give a legal opinion and legal opinions were not the Board's kuleana.</p> <p>Mr. Trask said that he didn't feel that the advice rendered by the CAO and the advisory opinions rendered by the Board of Ethics were mutually exclusive. Under rule 1.2 of the Board's Rules and Regulations, an advisory opinion is defined as <i>"an opinion rendered by the Board pursuant to request by any officer or employee, or former officer or employee, as to whether or not facts and circumstances of a particular case violate or will violate the standards of conduct prescribed by the Code of Ethics."</i> He clarified that the Board of Ethics applies and renders decisions on the law; the CAO advises on the law. The Board and the CAO work together to accomplish that. He added that an advisory opinion was an opinion that was informed by legal opinions, and that it was no coincidence that Mr. Murashige, Ms. Burriss, and Ms. Shiraishi were lawyers because the County knew they appreciated legal analysis, the idea of precedent, and could help render advisory opinions.</p> <p>Mr. Murashige said there were Attorney General opinions on the 89-day contract issue that said the person was an "employee", and asked why the Board had to answer the same question that had already been established.</p> <p>Mr. Trask stated that the County of Kaua'i was a political subdivision of the State of Hawai'i. Under Article 8, section 2 of the Hawai'i State Constitution, the County had modified home rule, which means that the</p>	

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	<p>County had plenary authority to structure its own governance which takes precedent over State statutory provisions covering the same. However, State statutory provisions regarding authority and power that are statewide concern took precedent over County ordinance on the same. He said State ethics decisions were used as guidance but were not binding because the County Code of Ethics was promulgated in the Charter and related to County governance.</p> <p>Mr. Murashige stated that unemployment benefits were paid by the State so there were two jurisdictions.</p> <p>Deputy County Attorney Nicholas Courson provided that part of the issue was that Mr. Crowell's question was poorly formulated and he shouldn't have asked the Board if he would be considered an "employee"; specifically, Mr. Crowell should have asked if section 3-1.10, Restrictions on Post-employment, applied to him.</p> <p>Mr. Trask said that where it might be beneficial for the CAO to help their clients' scope, draft, and present clearly cognizant questions to the Board, they are not currently assisting in drafting requests. He advised the Board that, under their rules, they could ask for further clarification from the requestor as well as have them present at the meeting.</p> <p>Mr. Curtis commented that as a realtor, he understood and appreciated that an opinion needed to be substantiated, and that the Board would comply with the request.</p>	
<b>Communication</b>	<u>BOE 2017-18 Possible Conflict of Interest dated October 20, 2017 from Arryl Kaneshiro relating to the nomination and appointment of Marissa L. Sandblom to the Charter Review Commission</u>	Mr. de la Pena moved to receive BOE 2017-18. Ms. Shiraishi seconded the motion. Motion carried 5:0.

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<b>Request for an Advisory Opinion</b>	<p><u>RAO 17-011 Request for an Advisory Opinion dated October 23, 2017 from Derek S.K. Kawakami relating to the nomination and appointment of Marissa L. Sandblom to the Charter Review Commission</u></p> <p>Mr. Kawakami stated that he felt there was no conflict but appreciated the value of the Board's opinion, and didn't want his vote for Marissa to cloud her appointment.</p> <p>The Board had no questions for Mr. Kawakami. Vice Chair Curtis called for the question.</p> <p>Ms. Burris asked if the Board needed a reason to support their finding to which Vice Chair Curtis said he thought they only needed a reason if there was a conflict.</p> <p>Mr. Murashige said he found that the relationship between Councilman Kawakami and Appointee Sandblom to the Charter Review Commission was remote. Any connection that he may have in his role as a trustee in the Waioli Corporation to the function of that organization was remote and any impact Ms. Sandblom's actions would have would be minimal at best. He said the Charter Review Commission does not pass regulations; they provide recommendations and the voters decide.</p> <p>Vice Chair Curtis concurred and asked for further comments from the Board to which there were none.</p>	<p>Mr. Murashige moved that the Board find no conflict of interest. Mr. de la Pena seconded the motion. Motion carried 5:0.</p>
	<p><u>RAO 17-012 Request for an Advisory Opinion dated November 3, 2017 from Arryl Kaneshiro relating to the nomination of Marissa L. Sandblom to the Charter Review Commission</u></p>	

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	<p>Mr. Kaneshiro clarified that his request was based on "perception", and that sometimes the public has the perception that a conflict exists. He said he didn't believe there was a conflict because Marissa, as a Charter Review Commissioner, would be acting in her own capacity, and per the Code of Conduct, he would not receive any personal benefits from her serving on the Commission.</p> <p>Mr. de la Pena asked Mr. Kaneshiro if he was a subordinate to Ms. Sandblom to which Mr. Kaneshiro replied no.</p> <p>Vice Chair Curtis asked Mr. Kaneshiro if Ms. Sandblom was his superior or would have influence over his employment at Grove Farm to which Mr. Kaneshiro clarified that she was a V.P. at Grove Farm, but she was not his boss and had no influence over his employment.</p> <p>With no further questions from the Board, Vice Chair Curtis asked for a motion.</p> <p>Vice Chair Curtis stated that Mr. Kaneshiro and Ms. Sandblom work for Grove Farm and asked if the appearance of conflict constituted a conflict. Mr. Murashige said it depended on the facts perceived or the perception of conflict. He said in this case there was a relationship, but didn't feel that relationship created a conflict.</p> <p>Ms. Shiraishi stated that perception of conflict was one of many factors the Board considered when making a determination. Grove Farm is a big company. Mr. Kaneshiro and Ms. Sandblom are far removed and her duties on the Charter Review Commission would not necessarily affect Mr. Kaneshiro or their working relationship.</p>	<p>Mr. Murashige moved that the Board find no conflict of interest. Ms. Burriss seconded the motion.</p>

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	Vice Chair Curtis called for the question.	Motion carried 5:0.
	<p><u>RAO 17-013 Request for an Advisory Opinion dated November 7, 2017 from Mel Rapozo on what constitutes a conflict of interest</u></p> <p>County Clerk Jade Fountain Tanigawa was present on behalf of Mel Rapozo to answer questions from the Board.</p> <p>Vice Chair Curtis said that it was clear to him that the perception of a conflict of interest was not a conflict of interest; therefore, councilmembers were not required to recuse themselves and were allowed to vote.</p> <p>Mr. Murashige asked Ms. Tanigawa if Mr. Rapozo wanted a continuance to which she replied that a ruling would be appreciated because the Council frequently dealt with the issue.</p> <p>Ms. Shiraishi disclosed that Mr. Rapozo was a client of her law firm but would not recuse herself on the matter.</p> <p>Vice Chair Curtis asked the Board if they felt they should wait to address the matter when Mr. Rapozo was present to answer questions. Mr. Courson cautioned that was not an option because Mr. Rapozo did not ask for a continuance, and the Charter says that advisory opinions would be rendered within 45 days.</p> <p>Mr. Murashige said he had difficulty responding to the request. The Charter or the County Code defines what conflicts are and the Board applies what is written to the facts; however, the request contained no facts.</p>	



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	<p>Vice Chair Curtis said that perception was without substance and that the facts that would generate the perception were what would determine the decision of a conflict. Without facts, the Board could not render an opinion on perception alone.</p> <p>Mr. Courson read the definition of an advisory opinion from the Board's Rules and Regulations. He said in his research on the matter, he found that in every case the question of ethics was based on the particular facts and circumstances of the case.</p> <p>Ms. Burriss said the Board could not define every single instance where there was a conflict, which would be the true answer to Mr. Rapozo's question.</p> <p>Vice Chair Curtis stated that perception of a conflict couldn't be a conflict of interest, but the substance behind the generation of that perception would be what an opinion could be rendered on. Mr. Murashige said that perception was what people perceived the situation to be, so perception could give rise to a conflict because the Board would perceive it in a certain fashion; however, public perception may be slightly different.</p> <p>Vice Chair Curtis asked the Board how they wanted to respond to Mr. Rapozo's request for an advisory opinion to which Ms. Burriss said the Board should decline the request, saying they couldn't answer the question of what constitutes a conflict of interest without the application of specific facts. Mr. Murashige agreed.</p>	<p>Ms. Burriss moved to decline rendering an advisory opinion for BOE 17-013 on the question of what constitutes a conflict of interest because the board has not been provided with facts upon which to render an opinion. Mr. Murashige seconded the motion.</p>

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	<p>Ms. Shiraishi said she read the request as asking whether a perception of conflict was determinative and if so, the Board could render an advisory opinion.</p> <p>Ms. Burriss stated that there were two questions and she would be willing to vote on her motion first and then on an opinion that perception was not necessarily a conflict.</p> <p>With no further discussion on the motion, Vice Chair Curtis called for the question.</p> <p>Mr. Murashige suggested amending the motion to add "in and of itself."</p> <p>Vice Chair Curtis asked Ms. Burriss to withdraw her second and for Ms. Shiraishi to restate the motion.</p>	<p>Motion carried 5:0.</p> <p>Ms. Shiraishi moved that the perception of a conflict of interest is not determinative that there is a conflict. Ms. Burriss seconded the motion.</p> <p>Ms. Burriss withdrew her second.</p> <p>Ms. Shiraishi moved that the perception of a conflict of interest in and of itself is not determinative that there is a conflict of interest. Ms. Burriss seconded the motion. Motion carried 5:0.</p>
<b>Disclosures</b>	<ol style="list-style-type: none"> <li>1. <u>Mary E. Tudela - Board of Ethics</u></li> <li>2. <u>Herman J. Texeira - Open Space Commission</u></li> </ol>	<p>Mr. de la Pena moved to receive disclosures 1 and 2, and deem them complete. Mr. Murashige seconded the motion. Motion carried 5:0.</p>
<b>Election of</b>		<p>Mr. Murashige nominated Vice Chair Curtis for</p>

SUBJECT	DISCUSSION	ACTION
<b>Chair and Vice Chair for Calendar Year 2018</b>		<p>Chair.</p> <p>Mr. de la Pena moved to close nominations. Ms. Shiraishi seconded the motion. Motion carried 4 ayes: 0 nays: 1 abstention.</p> <p>Mr. de la Pena nominated Maureen Tabura for Vice Chair. Mr. Murashige seconded the nomination.</p> <p>Mr. Murashige moved to close nominations. Ms. Shiraishi seconded the motion. Motion carried 5:0.</p> <p>Mr. Murashige nominated Ms. Shiraishi for Secretary.</p> <p>Mr. de la Pena moved to close nominations. Mr. Murashige seconded the motion. Motion carried 4 ayes: 0 nays: 1 abstention.</p>
<b>Announcements</b>	Next Meeting: Friday, January 19, 2018 – 1:00 p.m., Mo'ikeha Building, Liquor Conference Room	
<b>Adjournment</b>		Mr. de la Pena moved to adjourn the meeting at 1:55 p.m. Mr. Murashige seconded the motion. Motion carried 5:0.

Submitted by: \_\_\_\_\_

Reviewed and Approved by: \_\_\_\_\_

Lani Agoot, Administrative Specialist

Michael Curtis, Vice Chair

- ( ) Approved as circulated.
- ( ) Approved with amendments. See minutes of \_\_\_\_\_ meeting.